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From *Parker* to the Australia Acts: Sir Victor Windeyer and the Short-Lived Triumph of the Independent Australian Britons

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1. *Introduction*

In 1986, the last vestiges of Australia's imperial common law past was eradicated by the passage through the Commonwealth, State and Westminster Parliaments of the Australia Acts.[1] Eminent judges noted the sense of liberation that this legislation provided.[2] On its face, however, this sense of throwing off the imperial yoke is difficult to understand. Whatever the formal limitations that were removed by the Australia Acts, Australian courts had, since the end of the Second World War, been increasingly free to mould the common law to meet

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[1] Australia Act 1986 (Cth); Australia Act 1986 (UK). The state legislation – Australia Acts (Requests) Acts – was passed by the states the preceding year.

[2] eg A Mason, 'Reflections on the High Court of Australia' (1995) 20 MULR 273, 280; M McHugh, 'The Judicial Method' (1999) 73 ALJ 37, 39. More generally see J Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press 2006) 178-185; S Walpola, 'The Development of the High Court's Willingness to Overrule Common Law Precedent' (2017) 45 Fed L Rev 291, 303, 306-7; 'The Qualification to the Birthright Doctrine and beyond: The Judicial Attitude to Adapting the Common Law to Australian Conditions' (2020) 94 ALJ 294, 304-305; 'After the Australia Acts: The High Court's Attitude to Changing the Common Law' (2021) 21 Oxford University Commonwealth Law Journal 31; L Boyle, 'The Significant Role of the *Australia Acts* in Australian Public Law' (2019) 47 Fed LR 358.

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distinctly Australian conditions.[3] In this sense, there is more continuity with the past than those who see 1986 as a liberation acknowledge.

One reason for the failure to see the continuities is that the conventional narrative of the road to a judicial epiphany in the Australia Acts lies in what is known as the 'thwarted nationalism' view of Australian identity. As the historian Stuart Ward describes it:

> under this framework the element of antagonism in Anglo-Australian relations remains paramount, as the pernicious influence of British race patriotism raises its head to thwart Australian nationalists at every point where they might otherwise have grasped the nettle of independence... An analytical framework has become firmly entrenched in which independence is equated with defiance, self-assertion with divergence, autonomy with antagonism. Conversely, those Australian political or cultural figures deemed to have identified too closely with the British connection are looked upon as a national disgrace.[4]

Although the development of an Australian law was not the focus of the critique, the story of the gradual rise by fits and starts from imperial servitude to newly-fledged judicial independence fits well with the thwarted nationalism framework. For example, Paul Finn has quite recently discussed the journey to Australian judicial freedom from the Privy Council as a linear one, highlighting first the well-documented unhappiness by some members of the Australian High Court with decisions of the Privy Council. This was followed by the rejection by the Privy Council of a new strand of reasoning on occupiers' liability, developed by the High Court in the 1950s and 60s, in a controversial decision in 1964,[5] and concluding with the segmented breaking away from the control of the Privy Council culminating in the final emancipation of the Australia Acts of 1986. Finn nails his colours to the mast: 'I commenced studying law in 1964. *Quinlan* [the 1964 decision] created another ardent abolitionist. It struck me then, as it does now, as preposterous that a foreign court could contrive the law in Australia on such a subject despite the considered views of our own

[3] Paradoxically, as Mason himself recognised shortly after the legislation was passed: see A Mason, 'Future Directions in Australian Law' (1987) 13 Mon U L Rev 149. See also F Trindade, 'Towards an Australian Law of Torts' (1993) 23 UWA Law Rev 74, which considered developments the High Court had made to the law of torts over the previous 30 years, indicating the period before 1986 was not static.

[4] S Ward, *Australia and the British Embrace: The Demise of the Imperial Ideal* (Melbourne University Press 2001) 5-6.

[5] *Commissioner for Railways (NSW) v Quinlan* [1964] AC 1054.

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High Court.'[6] An important edited volume, *The Emergence of Australian Law*, published in 1989, contained a series of essays which largely reinforced this theme of a repressed separate Australian law breaking free from imperial domination during the second half of the twentieth century.[7] The Australia Acts were thus a landmark because they represented the final victory for an independent 'Australian' law. As Crawford put it, the foundation for the autochthony of Australian law was laid in the final abolition of appeals to the Privy Council in 1986.[8]

However, this view of the path to the liberation of the Australia Acts of 1986 was not the path of liberation that lawyers a generation earlier would have identified because it ignores the role of British race patriotism in conceptions of Australian law in the twentieth century. I have elsewhere argued that the notion that, in the first half of the twentieth century, Australian courts bristled under the weight of an imposed legal system misrepresents the self-understanding of Australian lawyers.[9] Australian judges and lawyers saw themselves as contributing to the common law, a shared resource of the British race. True enough, their contributions were rarely appreciated 'back home' but that did not change the commitment of Australian lawyers to the grand, corporate project of developing the common law. The common law was part of the inheritance that Australians took because they were British and being British defined who they were. As the historian James Curran notes, there is every reason to argue the case that the idea of 'being British' had a far more compelling resonance in Australia than in the United Kingdom,[10] something that the travel writer John Foster Fraser

[6] P Finn, 'Unity, Then Divergence: The Privy Council, the Common Law of England, and the Common Laws of Canada, Australia and New Zealand' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2016) 46. As early as 1987, Finn had also criticised the Privy Council for limiting a nascent Australian liability for nonfeasance for highway authorities in relation to injuries on the highways (P Finn, *Law and Government in Colonial Australia* (Oxford University Press 1987) 112). For a different view of these cases, see M Lunney, 'Highway Immunity and the Victimisation of Australian Law: Fact or Fiction?' (2019) 26 Tort L Rev 83.

[7] MP Ellinghaus, AJ Duggan & AJ Duggan, *The Emergence of Australian Law* (Butterworths 1989).

[8] J Crawford, 'Australian Law After Two Centuries' (1988) 11 Syd L Rev 444, 449-450.

[9] M Lunney, *A History of Australian Tort Law 1901-1945: England's Obedient Servant?* (Cambridge University Press 2018).

[10] J Curran, 'Australia at empire's end: Approaches and arguments' (2013) 10 History Australia 23, 28.

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observed when he visited the country in 1909.[11] Adopting the historian WK Hancock's lens of Australia as a nation of independent Australian Britons,[12] Australia's common lawyers can be seen as bilocated: physically in Australia, and emotionally in an almost metaphysical common law that was an integral part of the British race patriotism that underpinned their conception of Australian national identity.[13] When Fraser told his Australian audience that '[y]ou live freely beneath the Union Jack. It is well sometimes to think what that means',[14] he was not telling Australian lawyers anything they did not know: the 'British' common law was constitutive of their professional identity. From this perspective, the idea of an Australian judge proclaiming a common law that was somehow outside the common law tradition was simply a non sequitur. Yet this is exactly what the 'thwarted nationalism' approach seeks to find in its quest for the beginnings of an 'Australian law'. When unilateral declarations of independence are not found, from this perspective there is only one conclusion: Australian judges lacked the tools to declare an exceptional Australian law and hence engaged in a form of cultural cringe in replicating English law in Australia. Through the lens of British race patriotism, such an approach seems crude and ahistorical.

Even if one accepts the British race patriotism critique of the thwarted nationalism view of Australian identity for the first half of the twentieth century, however, the changed political dynamics after the Second World War created a new challenge to the sense of dual loyalties that underpinned British race patriotism. The nature and scale of the threat, and the impacts this had on the demise of the imperial embrace, as Ward puts it,[15] remain contested in Australian historiography. Broadly, the competing views take issue over the ubiquity of British race patriotism as a defining feature of representations of Australian national identity after the Second World War. Politics, art, literature, economics and elements of civil society have formed the battleground for

[11] JF Fraser, *Australia: The Making of a Nation* (Cassell & Co 1910) ch 2.

[12] WK Hancock, *Australia* (Ernest Benn 1930) ch 2.

[13] There is a vast literature on the influence of British race patriotism on Australian identity, some which is discussed below, but for a flavour see S Ward, 'Sentiment and Self Interest: The Imperial Ideal in Anglo-Australian Commercial Culture' (2001) 32 Australian Historical Studies 91; N Meaney, 'British and Australian Identity: The Problem of Nationalism in Australian History and Historiography' (2001) 32 Australian Historical Studies 76. For an example of the influence of British race patriotism on public figures see J Cotton, 'William Morris Hughes, Empire and Nationalism: The Legacy of the First World War' (2015) 46 Australian Historical Studies 100.

[14] Fraser (n 11) xix.

[15] Ward (n 4).

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these debates. Law has been largely absent, for perhaps two reasons. One is that historians have been put off by the technical expertise required to unpack legal development. More broadly, however, law may have seemed a less fertile area for analysis given the constraints imposed by the doctrine of precedent. While there were clearly some areas where law was distinctively Australian (such as constitutional law), the common law, especially in private law, was seen as essentially derivative and based on the law as declared in English courts. Almost by default, the thwarted nationalism view has shaped the story of the coming of age of Australian common law judicial independence in the second half of the twentieth century.

I want to suggest that the linear path to Australian judicial independence mapped by this approach is not quite so straightforward because it ignores the effects of British race patriotism. Using the tort judgments and writings of Sir Victor Windeyer, a judge of the High Court of Australia between 1958-1972 and one of Australia's most important legal figures of the post-war period as a base,[16] I want to suggest that the key moment in the development of Australian legal independence was not 1986 but 1963, when the High Court of Australia in *Parker v R* first held itself free to depart from decisions of the House of Lords.[17] It was the rationalising of the events of 1963 by the independent Australian Britons of Windeyer's generation that led to 1963 being seen as an event that stressed continuity as much as a change. Together with the 1966 Practice Statement of the House of Lords allowing their Lordships to depart from their own previous decisions, the decision in *Parker* and its immediate aftermath for a brief period gave rise to the ideal of a new co-operative Commonwealth legal heirarchy based on equality and the abstract merits of legal arguments, an arrangement underpinned by a British race patriotism suitable for the post-colonial era. By the early 1970s, however, this vision of a judicial Camelot was proving elusive. Once this vison for the future of Anglo-Australian legal relations had receded, the time was ripe

[16] On Windeyer's eminence see D Heydon, 'Outstanding Australian Judges' in J Sackar & T Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press 2018) 14-24.

[17] *Parker v R* (1963) 111 CLR 610. This is not to suggest that the importance of the statement in *Parker* has not been recognised: for example see T Josev, 'Parker v The Queen and Dixon's Diminishing Confidence in the Privy Council' in J Eldridge and T Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 25; M Kirby, 'The Old Commonwealth - Australia and New Zealand' in L Blom-Cooper, B Dickson and G Drewry, *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009) 339, 341.

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for a new, more brazen 'Australianness' in Australian law of which the Australia Acts of 1986 was the culmination.

2. *1963 and All That*

In 1961, in *DPP v Smith*,[18] the House of Lords held that it was sufficient to satisfy the *mens rea* requirement for murder if a reasonable person in the position of the accused would have contemplated that the accused's conduct was likely to cause grievous bodily harm to another. The decision prompted the well-known comment of High Court of Australia justice Sir Wilfrid Fullager, to Sir Owen Dixon: 'Well, Dixon, they're hanging men for manslaughter in England now.'[19] When the High Court of Australia came to consider the question two years later, in *Parker v R*, Dixon CJ wrote on behalf of all members of the court (including Windeyer):

> I say too unfortunately for I think it [*Smith*] forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* Case (1961) AC 290 I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept… I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's* Case (1961) AC 290 should not be used as authority in Australia at all.[20]

The language used by Dixon CJ in announcing this change of practice is striking. It should be remembered that, as a matter of strict precedent, the High Court of Australia had never been bound by decisions of the House of Lords (or the lower, in the English hierarchy, Court of Appeal). These courts were not part of the judicial hierarchy in Australia. From early in its history, however, the High Court had adopted the practice of considering itself bound by decisions of the House of Lords, and sometimes even the Court of Appeal, out of

[18] [1961] AC 290.
[19] Quoted in P Ayres, *Owen Dixon* (Miegunyah Press 2003) 276.
[20] (1963) 110 CLR 610, 632.

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respect for the broad imperial lens through which decisions of, particularly, the House of Lords needed to be viewed, although no doubt the fact that membership of the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords was overlapping played its part.[21] In perhaps it most considered reflections on the question, in *Piro v W Foster & Co Ltd* in 1943, the High Court indicated that it would follow later decisions of the House of Lords in preference to earlier inconsistent decisions of its own.[22]

There is no doubt that this decision has overtones of judicial obsequiousness but the context must be remembered. The 'British' peoples were under threat like never before in 1943, and while Australian Prime Minister John Curtin had famously indicated at the end of 1941 that '. . .Australia looks to America, free from any pangs as to our traditional links or kinship with the United Kingdom',[23] in hindsight this was not in fact a clarion call for a major realignment of Australia's position in the world. As Curran has shown, Curtin remained a British race patriot throughout the remainder of his Prime Ministership (he died before the war ended in 1945).[24] Seen through the lens of British race patriotism, the decision in *Piro v Foster* is an affirmation of the commitment to the British world, a world in which Australians believed they played an important part.[25] Moreover, as soon as the war ended, Australian courts began to find ways around following English, especially Court of Appeal, decisions they did not like—as they had done expertly for at least the first half of the twentieth century.[26] When this could not be done, one senses an increasing frustration in some of the judgments in the High Court. As early as 1942, Dixon had expressed disappointment that the Court of Appeal had not considered a prior High Court decision on a question before the court before reaching their decision even though he ultimately held that the High Court should follow Court of Appeal decisions in preference to earlier inconsistent decisions of the High Court.[27] Seventeen years later, in *Commissioner for Railways (NSW) v Scott*[28] on the scope of the

[21] G Barwick, 'Precedent in the Southern Hemisphere' (1970) 5 Israel Law Review 1, 19-29.
[22] (1943) 68 CLR 313, 320 (Latham CJ); 326 (Rich J); 326 (Starke J); 340-342 (Williams J).
[23] *Sydney Morning Herald*, 29 December 1941, 7.
[24] J Curran, *Curtin's Empire* (Cambridge University Press 2011).
[25] Lunney, *A History of Australian Tort Law* (n 9) 21-22.
[26] *Wright v Wright* (1948) 77 CLR 191.
[27] *Waghorn v Waghorn* (1942) 65 CLR 289, 297.
[28] *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

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action *per quod servitium amisit*, Dixon was more definitive. After holding that the result in the case was dictated by English decisions in the 1950s, including, implicitly, the House of Lords, Dixon commented, wryly: 'Uncorrected I am afraid that I should have said that the Commissioner might recover damages, appropriately measured, from the wrongdoer in an action *per quod servitium amisit*' before demolishing the reasoning of the English cases.[29] Windeyer did the same but reached a different conclusion on the facts as he felt able to sufficiently distinguish the relevant House of Lords' decision and relied on earlier High Court authority allowing departure from English Court of Appeal decisions in limited circumstances. There was no lack of confidence, however, in the conclusion: 'In this case, I consider that to limit the cause of action on which the plaintiff relies to injuries to menial and domestic servants would be to create a further anomaly in the law, that such a limitation is not demanded by social needs, and is not supported by authority, logic, precedent or history.'[30]

In light of this progression it is somewhat surprising to see the gravity in Dixon's pronouncement: in many ways the statement in *Parker* was a logical step from what had gone before it. But the relation of Dominion legal authority to English precedents was only a part of a much wider realignment that was being forced on Australia in its relationship with the United Kingdom. Ward has argued that, despite occasional and sometimes profound disagreement, Anglo-Australian relations played out within the context of a British race patriotism that was seen to bind Australia to the United Kingdom and that extended to the immediate post-war world.[31] One only needs to look to histories of the 1954 Royal Visit to Australia, where it is estimated that 75% of Australians turned out to see 'their' Queen.[32] Contemporary academics, too, said little to suggest fundamental change in the relationship. In a chapter on Australia between 1929-1950, Percy Partridge, Professor of Social Philosophy at the Australian National University, commented in 1955 that 'there has never been any doubt that if an issue arose in which Australia's association with Britain were really at stake, for example, of peace and war, Australia would still necessarily cleave to the British connection.'[33] Ward argues, however, that this

[29] ibid 397-404.
[30] ibid 463-4.
[31] Ward (n 4).
[32] J Connors, *Royal Visits to Australia* (National Library of Australia 2015) ch 2.
[33] PH Partridge, 'Depression and War, 1929-1950' in G Greenwood (ed), *Australia: A Social and Political History* (Angus & Robertson 1955) 403.

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relationship was terminally fractured by the decision of the Macmillan government in the United Kingdom to seek membership of the European Economic Community. Ward details the sense of betrayal the decision engendered. While the immediate concerns were economic—as Australia would lose preference to the UK markets—it was the realisation that Australia's ultimate interests were not tied to that of the United Kingdom that caused the greatest turmoil. As Ward notes, throughout the negotiations it slowly dawned on Australian politicians and civil servants that they were, perhaps, not getting the full story from their United Kingdom counterparts, and that assurances that the interests of Australia and the other Dominions would be protected were largely empty.[34] The initial hostility and sense of betrayal typified by the public pronouncements of Deputy Prime Minister Jack McEwan eventually gave way to resignation that the break would come and that Australia would sooner or later have to look out for itself. Great Britain was no longer great and even to a strident Anglophile like Prime Minister Robert Menzies it was evident that the 'community of British peoples' model that he cherished (largely the old white Dominions) could not be replicated in the Commonwealth that was to take its place. The veto by De Gaulle of this attempt did nothing to change the situation: on both sides it was realised a major realignment was necessary.

Parker was argued before the High Court in August 1962 and judgment was delivered in May 1963. It is difficult not to see the choice of expression—critical situation in our (Dominion) relations to the judicial authority as precedents of decisions in England—as being influenced by the wider changes to the Anglo-Australian relationship that were unfolding. In July 1962, the Minister assisting the Treasurer, Lesley Bury, gave a speech rejecting Cabinet colleague McEwan's dire economic forecasts for Australia if Britain joined the common market. Ward argues that the change of position heralded by the speech was supported by senior Liberal party figures including Harold Holt and even Robert Menzies. This policy revision was significant:

> This shift in emphasis was fundamental in that it implied a growing public awareness that Britain would enter the Common Market regardless of Australian interests, and that little useful purpose could be served by harping on the dire consequences. This, in turn, would provoke a wider debate about the kinds of measures necessary to alleviate any future hardship.[35]

[34] Ward (n 4) chs 3-5.
[35] ibid 190.

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In this environment it was hard to see how the necessary measures to alleviate future hardship would require adherence by the High Court to decisions of the House of Lords thought to be incorrect.

The political challenges to the legal status quo took place in the context of a wider cultural and intellectual milieu that was exploring and promulgating new models of Australian identity. A generation earlier, in work now largely forgotten but for which High Court Justice HV Evatt wrote a forward, Francis Clancy gave a class-based version of the rise of an Australian nation that was quite different from then conventional views.[36] In 1958, Russel Ward published *The Australian Legend*, arguing that Australian nationalism derived not from the Anglo-Australians who saw Britain as home but from the independent, pioneering bush workers who had carved out a series of qualities that were distinctly Australian, qualities not necessarily associated with Hancock's independent Australian Britons.[37] And in 1962 Manning Clark published the first volume of his *History of Australia*, stressing the importance of the Australian physical environment to the development of European civilisation in Australia.[38] The intellectual milieu was certainly ripe for Australia's highest court to formally break from its past traditions. Exactly what that would mean in practice, however, was less clear.

3. *Sir Victor Windeyer and the Independent Australian Britons*

One of the members of the High Court who would decide what the new freedom meant was Sir Victor Windeyer. The Windeyer family of which he formed part had distinguished and long-standing connections in New South Wales: his father was a solicitor, his uncle a King's Counsel, his grandfather was twice Attorney General and a judge of Supreme Court of New South Wales, and his great-grandfather was a barrister and an elected member of the first (partly) elected Legislative Council in 1843.[39] This

[36] F Clancy, *They Built A Nation* (New Century Press Limited 1939).

[37] R Ward, *The Australian Legend* (Oxford University Press 1958). Cf. S Chavura and G Melleuish, *The Forgotten Menzies* (Melbourne University Press, 2021) 25 who note that Hancock's independent Australian Britons were politically self-reliant. This does not necessarily equate with the practical self-reliance that underpinned the national characteristics identified by Ward.

[38] CMH Clark, *A History of Australia Vol 1* (Melbourne University Press 1962).

[39] V Windeyer, 'Address at the Conference of Historical Societies of the Hunter River' in B Debelle (ed) *Victor Windeyer's Legacy: Legal and Military Papers* (Federation Press 2019) 236. See also V Windeyer, *The Windeyers: Chapters of a Family History* (Haldene Publishing 1992).

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was a family steeped in the world of British Australia. Apart from his family background, Windeyer himself was immersed in the history of the common law. He had given lectures for law students at the University of Sydney on this subject while at the bar and these were later published in a much respected volume.[40] Where subject matter allowed, his judgments were replete with historical references.[41] In one of his first judgments after joining the High Court, *Jones v Dunkel*,[42] he provided a masterly overview of the place and function of applications for nonsuits in a civil jury trial, assisted perhaps by the relative currency of this knowledge in New South Wales where the Judicature Acts reforms were not introduced until the 1970s. And his 'informal' address to the Australian Law Librarians Association at the University of Sydney Law School in July 1977, 'Of Legal Dictionaries', reveals not only detailed knowledge but also an extensive collections of such works.[43] The powerful legacy of the common law was not wasted on him.

Apart from law, Victor Windeyer is remembered in Australia for his distinguished military career. He commanded a battalion in the siege of Tobruk, and was a Brigadier during the Battle of El Alamein and later in New Guinea and Borneo. Windeyer's reminiscences on the death of Field Marshal Lord Montgomery, whom he met while in command in North Africa, are a powerful testament to the connection he felt to this British commander. The image of Montgomery wearing an Australian slouch hat and seeking an Australian Imperial Force 'Rising Sun' badge when he visited Windeyer's command, explained by Montgomery on the basis that his father was 'Bishop of Tasmania', were tangible reminders of the common bond believed to be shared by

[40] V Windeyer, *Lectures on Legal History* (Law Book Company of Australasia 1938). A second edition was published in 1949. Permission was sought from authors in the United States to use excerpts in their own texts: see Letter WH McBratney (University of Arizona) to Windeyer, June 5, 1963 (State Library of New South Wales ('SLNSW), Windeyer Family Papers ('WFP'), MLMSS 9932, Box 8); Letter Edward Murphy (Notre Dame Law School) to Windeyer, April 27, 1964 (SLNSW, WFP, MLMSS 9932, Box 5). The first edition prompted congratulations from the Chief Justice of New South Wales Sir Frederick Jordan, a man not noted for gratuitous praise (Letter Jordan to Windeyer, 21 June 1938 (SLNSW, WFP, MLMSS 9932, Box 5).

[41] W Gummow, 'Sir Victor Windeyer: An enduring legacy' (2019) 47 Aust Bar Rev 1. Wells J of the South Australian Supreme Court commented on Windeyer's retirement from the High Court that 'the generally historical approach in your reasoning was one that I always found most satisfying and enlightening (SLNSW, WFP, MLMSS 9932, Box 4). Wells had served under Windeyer's command during the Second World War.

[42] (1959) 101 CLR 298.

[43] Debelle (n 39) 196.

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members of the British race.[44] For Windeyer, the common law was part of that common bond, and while the decision in *Parker v R* was hardly an abrupt termination of that bond, it was nonetheless a statement of intent. But of what intent?

The demise of the imperial embrace that commenced with Britain's decision to seek membership of the European Economic Community sparked a wave of writing about the possibilities now available for a new Australia. One of the most evocative of these analyses, Donald Horne's *The Lucky Country*, first published in 1964, identified both a drift away from 'pro-British imperialist jingoistic feeling' and the gap that was left when the imperial embrace loosened. Horne commented:

> Fewer Australians really liked the British than liked the idea of the British, the pomp of empire and the historical and cultural heritage to which they felt they had as much right as their contemporaries in the British Isles.[45]

The sense of equality, of being a repository of the best features of British culture, can be found in the writings of Australian judges well before *Parker's* case.[46] While it reflected self-confidence, it also presented Australian lawyers with a paradox. The common law was their law as much as that of England and Wales. While Horne and others might advocate for Australia's future in its Asiatic region, this made more sense for trade and commerce (for example) rather than for law or other constitutional arrangements. For Windeyer, on the apex court in the Australian system, the question was how this commitment to something as structural as the common law could be maintained consistent with recognising Australia's new place in the world.

Windeyer's contribution to solving this dilemma came through his membership of the High Court benches that next faced the question of what to do with unwanted English authority. The first came in an area of particular judicial interest for Windeyer, awards of damages in personal injury actions. Almost immediately from his joining the court, Windeyer began delivering (often leading) judgments in this area. Apart from his mastery of procedure and his comments on appellate review of appeals against jury verdicts, Windeyer also deconstructed

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[44] V Windeyer, 'Address at Memorial Service for Field Marshal Lord Montgomery' in Debelle (n 39) 174, 176.

[45] D Horne, *The Lucky Country* (first published 1964, Penguin Books 1971) 96.

[46] For example, in Sir Samuel Griffith's resentment at suggestions of colonial judicial inferiority: RB Joyce, *Samuel Walker Griffith* (University of Queensland Press 1984) 323; J Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press 2000) 28-30.

the essence of this kind of award. A common theme of these judgments was the difference between injury to earning capacity—which was objective and could be valued by reference to economic criteria, if only imperfectly—and damages for non-pecuniary loss which had no such objective base. For this latter head of damages, he introduced a theme in his early judgments that would receive greater prominence later in his judicial career : that damages for non-pecuniary loss were related to the ability of the plaintiff to receive benefit from them. In 1961, in *Thatcher v Charles*, after noting that measuring in money such things as pain and suffering or the impairment of the capacity to lead life to the full really involved dealing in incommensurables and was an attempt to weigh imponderables,[47] he commented:

> For example, if a plaintiff has been rendered a permanent invalid in need of constant care, then the emphasis in any assessment may well be on the need for an income to ensure this care and also to provide such comforts as he would otherwise lack and which his mental and physical state will enable him to benefit from or enjoy.[48]

The relationship between damages for non-pecuniary loss and a plaintiff's physical and mental state was explored more fully two years later in *Teubner v Humble*. After explaining why a claim for loss of earning capacity could be monetarised on an economic basis, he stated his view that such reasoning could not apply for the claim for loss of amenity. As such awards were made to provide substitutes for the lifestyle that was lost as a result of the tort, their validity depended on their being able to be appreciated and used for that purpose:

> But suppose a person deprived of all his powers of mental or physical activity: Is he to have as damages for loss of enjoyments and amenities a sum that exceeds the utmost that can be used to provide for his nursing, and his comfort, that is to have money that he can never use, which can not be used for his benefit, and which he cannot even dispose of by will for ex hypothesi he has been deprived of testamentary capacity? I have considered what has been said in the reported cases about "objective" as against "subjective" tests in this connexion. But, until the matter be definitely concluded by a considered judgment of this Court or by some authority binding on us, I am not prepared to accept the view that damages for loss of enjoyment, loss of amenities, can properly exceed any sum that the injured person can in any way enjoy or which can be used to provide him with comforts or amenities. Damages are given as

[47] (1961) 104 CLR 57, 72.
[48] ibid 76.

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> compensation to the injured man for his injuries. So far as his injuries consist of loss of enjoyment, I do not see that money that he cannot use and which cannot be used for him, and the possession of which can mean nothing to him, is compensation.[49]

The choice of words Windeyer used to describe the authority that would be required to change his views is telling. In April 1966, Windeyer gave a speech to the New Zealand Law Society Conference in Dunedin on unity and disunity in the common law. One month earlier, he had delivered judgment in *Skelton v Collins* where he said that his judgment was 'not the place for an essay on jurisprudence or a full consideration of the theoretical problem of reconciling a common heritage of doctrine with the development of differing doctrines'.[50] It is tempting to think that the questions in *Skelton v Collins*—which required decision on whether English, including House of Lords, authority would be followed—prompted Windeyer to garner his thoughts for the lecture the following month. However, it is clear that Windeyer had been thinking about how to deal with the implications of *Parker* well before his judgment in *Skelton*. Windeyer had been approached to deliver the lecture in the middle of 1965.[51] It was initially suggested that he say something about recent developments in tort law but Windeyer suggested, and it was agreed, that he comment on unity and disunity in the common law.[52] This may have been prompted by proposals for a Commonwealth court that had been mooted by the English Lord Chancellor—a proposal with which he, along with Australian Prime Minister Robert Menzies, disagreed.[53] Concerned to avoid comment on a current political issue, Windeyer nonetheless wanted to say something more general about the demise of the 'one common law' for the empire ideal of which the High Court decision in *Parker* had played its part. Viewed in this light, the comments in *Teubner* about 'some authority binding on us' suggests that the consequences of *Parker* for aspects of the law of damages in personal injury were in Windeyer's mind almost as soon as *Parker* was given.

[49] (1963) 107 CLR 491, 507.
[50] (1966) 115 CLR 94, 135.
[51] Letter FW Guest to Windeyer, 13 April 1965; Letter Windeyer to FW Guest, 27 April 1965 (SLNSW, WFP, MLMSS 9932, Box 5).
[52] Letter FH Guest to Windeyer, 18 June 1965; Letter Windeyer to FH Guest, 16 July 1965; Letter FH Guest to Windeyer, 22 July 1965 (SLNSW, WFP, MLMSS 9932, Box 5).
[53] Letter Alexander Downer (Australian High Commissioner to the United Kingdom) to Windeyer, 26 October 1965; Letter Windeyer to FW Guest, 27 April 1965 (SLNSW, WFP, MLMSS 9932, Box 5).

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Whatever the original motivation for the lecture, there is no doubt that by the time it was delivered its form was shaped by three cases, two of which raised the same issue, that came before the High Court for argument in the second half of 1965. The first was *Skelton v Collins*, argued in September 1965 and delivered in March 1966, one month before Windeyer's Dunedin lecture. While there were other issues relating to quantum of damages, there were two main questions for the High Court. The first was whether it should follow the Court of Appeal decisions in *Wise v Kay*[54] and *Oliver v Ashman*[55] limiting the claim for damages for loss of earning capacity to the plaintiff's post tort life expectancy, even if that had been shortened as a result of the tort. The second was whether the High Court should follow the recent decision of the House of Lords in *H West & Son Ltd v Shepherd* deciding, by a 3-2 majority, that non-pecuniary damages for loss of amenity should be assessed objectively rather than subjectively.[56] By varying majorities both the established English positions were rejected by the High Court. As noted above, Windeyer had earlier stated his views on both of these questions and on reconsideration of them he felt no need to alter them. While other members of the High Court had drawn inspiration from an earlier decision of the House of Lords on damages for loss of expectation of life,[57] Windeyer was equivocal about that decision and grounded his judgment on the wider general principles he had previously espoused. For present purposes, however, it is not his legal reasoning as such that is important but rather his comments on how earlier English precedent should be handled. After politely pointing out that the statement of the Privy Council in *Robins v National Trust Co Ltd*[58] that a colonial court was bound to follow decisions of the House of Lords was not true for the Commonwealth of Australia,[59] he went on to point out the creative element in common law reasoning. While the doctrines and principles of the common law were the inheritance of the British race, 'how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself.'[60] The inheritance of the law of England:

[54] [1962] 1 QB 638.
[55] [1962] 2 QB 210.
[56] [1964] AC 326.
[57] *Benham v Gambling* [1941] AC 157.
[58] [1927] AC 515, 519.
[59] (1966) 115 CLR 94, 134.
[60] ibid 134

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> does not consist in a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules. A narrower view than this would put a sad strain upon allegiance.[61]

One factor that might encourage divergence was the nature of the decision that was made by the English court: 'not all judgments of the House of Lords are equally persuasive and all statements in all speeches of their Lordships are not equally acceptable.'[62] If the decision in question was made only after considering English authority, to meet economic and social conditions prevailing in England, and where the law itself was fluid and responding to conditions which were not the same in England and Australia, this was a situation where judgments might not be as persuasive. In his view the law of damages, especially damages for personal injury, was of that kind. Windeyer had long expressed his view that the variety of sources of non-tortious compensation for injury had some effect on the corresponding legal rules for awards of damages for the same loss.[63] Perhaps too his scepticism as to the accuracy of the methods the common law devised to assess damages in personal injury cases made it hard for him to see uniform rules as inevitable.[64] And while these background factors might cause a fracture in the ideal of a uniform common law, the value of the ideal could be overstated:

> Uniformity and solidarity of law throughout the countries inhabited by British peoples may up to a point be a good in themselves. But too much store can be set upon uniformity of law when it operates in conditions that are not uniform.[65]

While Windeyer had expressly noted that his judgment in *Skelton* was not the place for a detailed exposition of his views on these issues, such an avenue was available in his New Zealand Law Conference

[61] ibid 135.
[62] ibid.
[63] See in particular *Paff v Speed* (1961) 105 CLR 549; *National Insurance Company of New Zealand v Espagne* (1961) 105 CLR 569.
[64] 'I can only hope that some day the law will provide some better way of meeting the consequences of day-to-day hazards than by actions for negligence and a measuring of damages by unprovable predictions, metaphysical assumptions and rationalized empiricism': *Skelton v Collins* (1966) 136. See also letter Windeyer to Sir John Barry, Justice of the Supreme Court of Victoria, 12 October 1967 (SLNSW, WFP, MLMSS 9932, Box 5). He also admitted in correspondence with John Fleming that he found the latter's book 'useful and always interesting and thought provoking': letter Windeyer to JG Fleming, 8 June 1970 (SLNSW, WFP, MLMSS 9932, Box 5).
[65] (1966) 115 CLR 94, 136.

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speech delivered the next month.[66] There is in fact much overlap, even in language, between the two but the lecture allowed Windeyer to set out his framework for how the old 'one common law' ideal might work in an era where strict legal conformity with English law was not required. He began by pointing out that, in fact, English law had not been uniform in much of the empire since the nineteenth century because of the legislative competence granted to self-governing colonies. In Australia, the relative legislative freedom allowed by the *Colonial Laws Validity Act 1865* (UK) had resulted in considerable diversity by the middle of the twentieth century: in tort law, for example, Australian jurisdictions allowed claims for bereavement and also a statutory claim for nervous shock.[67] Why then was their 'misgiving and apprehension' at the idea of the common law being developed differently by different Courts, each working in the traditional way?[68] He identified two reasons: the pull of race and the declaratory theory of the common law. He spent little time on the latter, no doubt because by the 1960s the declaratory theory of law was largely discredited, but he was acutely interested in the former. British race patriotism was a defining component of Australian identity for much of twentieth century Australia. It was profoundly important to Windeyer. As far back as 1933, when he went to Toronto as part of the Australian delegation to the British Commonwealth Relations Conference,[69] he was confronted with the much more independent position taken by the Canadians to imperial matters and was clearly surprised. Writing to his uncle he gave a number of reasons for the 'strange forms' Canadian national pride took but the most important was race: 'In the first place Canadian nationalism is not based as is Australian national feeling on common British stock, on federation, and on the achievements of the war years.'[70] Equally interesting was the sense of 'empire' he felt when he shared a train with a tobacco grower from Rhodesia, a mining

[66] V Windeyer, 'Unity, Disunity and Harmony in the Common Law' (n 39) 114.

[67] South Australia introduced a statutory claim for bereavement in 1940 (Wrongs Act Amendment Act 1940 (SA)) and New South Wales introduced a statutory claim for mental harm in 1944 (Law Reform (Miscellaneous Provisions) Act 1944 (NSW)). On the introduction of the latter legislation see M Lunney, 'Unseen Networks: The Legal Professions' Involvement in the Law Reform (Miscellaneous Provisions) Act 1944' (2018) 92 ALJ 449; Lunney (n 9) 137-144.

[68] V Windeyer, 'Unity, Disunity and Harmony in the Common Law' (n 39)123.

[69] For of a history of these meetings see WD McIntyre, 'The Unofficial Commonwealth Relations Conferences 1933-1959: Precursors of the Tri-sector Commonwealth' (2008) 36 Journal of Imperial and Commonwealth History 591.

[70] Letter Windeyer to Victor Windeyer (Uncle), 30 September 1933 (SLNSW, WFP, MLMSS 9932, Box 4).

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engineer from West Africa, New Zealanders, Englishmen and Australians all of whom took an interest in pictures of public events in London (and all of whom were no doubt white). This sense of the empire involving being part of a team was reinforced by his military service and remained with him all his life.[71]

It is no surprise, then, that Windeyer trod very carefully when he explained why casting off the legal imperial yoke of deference to decisions of English courts (especially the House of Lords) was not an act of disloyalty. At the outset he pointedly noted that, in case anything he said 'should be construed as an unseemly assertion of independence or as a strident Australian nationalism', his family had been British subjects in a British land, for six generations, proudly so. Australian and New Zealand war service was the also the service of kinsmen, not allies, there because of the pull of race and of history, obedient in loyalty.[72] The common law was part of this kinship:

> What we call the common law of England is not the law of a land but the law of a people – the British peoples, for Scotsmen perforce must accept it when they are overseas. It is not the law of a place, but the customs of our race. It is part of the civilisation and culture that is ours.[73]

As place was not an essential component of the common law, what features were required for there to be a meaningful 'common law? While a homogenous race was necessary, so too was a sufficient degree of economic unity, an organic political unity, and jurisdictional unity through a court with power to declare the law throughout the country. But if Australia had all these—which he thought it did—how was this common law to be identified? In Windeyer's view, the answer in Australia was the *corpus iuris*, not of Roman law but of the British common law. Sources included what Australian courts had said but also English, New Zealand, and the courts of other common law countries. This was not done 'to stuff judgments with numerous exotic references, but eclectically to discover the law.'[74] Windeyer realised that this Catholic approach to identifying the law would inevitably mean that the law could not remain the same everywhere but did not see this as a matter of regret:

[71] See the extract from his commemoration speech given at the Gosford War Memorial, 10 April 1983, when he was 82 (SLNSW, WFP, MLMSS 9932, Box 7).

[72] Windeyer, 'Unity, Disunity and Harmony in the Common Law' (n 39) 124.

[73] ibid 124.

[74] ibid 125.

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> . . .we misunderstand our inheritance of the law if we think of it as a number of specific legacies to be selected for us from time to time by Courts in England. Rather it is a share in a general legacy, of method and spirit, of doctrine rather than dogma, of general principle rather than of particular rules, in short a system of law. We must not only accept our inheritance. We must use it. . . A nation must not only make its own laws. It must for itself expound and apply the law that rules its people. That is the responsibility that accompanies heritage.[75]

While the Whiggish undertones are obvious, there was also some realpolitik in Windeyer's views. Britain was seeking closer ties to Europe and with a 'growing consciousness of our nationhood thus forced upon us, there is coming a greater sense of the realities and responsibilities of nationhood—a greater sense of destiny.'[76] That destiny might encompass pointing the way to those newly independent states of the former empire—with largely non-white inhabitants—by showing the benefits of accepting English common law by choice rather than seeing it as an imposition.[77] Whatever the limits of seeing the common law as being enthusiastically adopted by peoples upon whom it had been forced and who were not of the 'race' of which the common law was a cultural artefact, it was an attempt to recast the place of the common law in a post-empire world.

While there are obvious links between Windeyer's judgment in *Skelton* and the New Zealand lecture, it is very likely that his thoughts were also affected by two cases, both raising the same issue, argued before the High Court in November 1965, *Uren v John Fairfax & Co Pty Ltd*[78] and *Uren v Australian Consolidated Press Ltd*.[79] In *Skelton*, the High Court had not followed two Court of Appeal decisions. This was rare but not unparalleled. *Skelton* was also the first time since *Parker* that a House of Lords' decision had not been followed by the High Court but the result in the Lords had only been by a 3-2 majority, and while this was still very significant, there was clearly support among the English judiciary for the position taken by the High Court. However, when the High Court was asked to consider whether it should follow a unanimous decision of the House of Lords on the availability of

[75] ibid 126.
[76] ibid 127.
[77] ibid 127.
[78] (1966) 117 CLR 118.
[79] (1966) 117 CLR 185. For discussion of the cases see M Lunney, 'Uren v John Fairfax & Sons Pty Ltd' in D Rolph (ed), *Landmark Cases in the Law of Defamation* (Hart 2019) 151.

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exemplary damages, *Rookes v Barnard*,[80] there were no minority judgments to which colours could be nailed. There was also a body of case law in Australia pre-dating *Rookes* allowing exemplary damages in a wider category of cases than was allowed in *Rookes*.[81] Here the only option was outright disagreement, a course that all members of the High Court took other than Windeyer himself. But Windeyer's view was the result of his own interpretation of Lord Devlin's speech and he was at pains to affirm his position stated in *Skelton*. If the House of Lords had overturned the previous law on exemplary damages, 'it indicates no disrespect for the high authority of their Lordships' House, no breaking of the ties light as air, if we, having a duty to abide by the law that we have inherited and having in mind the way it has been declared here, feel unable to join in this.'[82]

Unlike *Skelton*, however, there was an appeal by one of the parties to the *Uren* litigation to the Privy Council.[83] This gave rise to a problem that was recognised almost as soon as the *Parker* decision had been handed down. In a letter from Viscount Simonds to Chief Justice Dixon in June 1963, the former noted that the *Parker* decision raised 'no end of a problem':

> Imagine a case where in which special leave is sought [to appeal to the Privy Council] on the ground that a direction to the jury is in direct conflict with Smith, and it is opposed on the ground that the Australian High Court has rejected Smith. That is the problem in its nakedness.[84]

Viscount Simonds suggested what he would do in such cases—the petition would be refused and 'I should on this occasion bless the

[80] [1964] AC 1129.
[81] Lunney, 'Uren v John Fairfax & Sons Pty Ltd' (n 79) 160.
[82] *Uren v John Fairfax & Co Pty Ltd* (1966) 117 CLR 118, 148.
[83] There were two separate actions brought by Uren in respect of allegations made against him by newspapers owned by the Fairfax Press and Australian Consolidated Press (ACP). The most serious allegations against Uren were common to both the Fairfax and ACP publications but Uren also sued ACP on two further publications. Although ACP won its appeal before the High Court, it sought leave to appeal to the Privy Council on the basis that the High Court's reasoning – which was based on the Australian decisions pre-*Rookes* – was incorrect. The Privy Council accepted that in rare cases special leave could be granted in these circumstances. For comment see J Lehane, 'Stare Decisis, Judicial Policy and Punitive Damages: Uren v John Fairfax & Sons Limited; Australian Consolidated Press Limited v Uren' (1968) 6 Syd L Rev 111, 113-115.
[84] Letter Viscount Simonds to Owen Dixon, 9 June 1963, Papers of Sir Owen Dixon, National Library of Australia, MS Acc09.166, Box 5. I am grateful to Dr Henry Mares for providing me with copies of this correspondence.

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practice of giving no reasons'[85] – but there had been an important change between when that letter was written and the *Uren* appeal. When Simonds had written to Dixon, the House of Lords remained bound by its own previous decisions so the unenviable task for the Privy Council was either to depart from a decision of the House of Lords which the latter remained bound by—something that would be undesirable for members of the Judicial Committee when they sat in the Appellate Committee of the House of Lords—or overturn a considered decision of the High Court of Australia thereby in practice making the High Court bound by a decision of the House of Lords. This changed, however, in 1966 when the House of Lords' Practice Statement allowed their Lordships to depart from their own previous decisions.

Commentators immediately recognised the significance of this event to the future relations between English and Dominion courts. Some went as far as to suggest that the Practice Statement was prompted by the High Court's decisions in *Parker* and *Skelton*.[86] Edward St John thought that the day when the carefully considered judgments of the High Court could be ignored by English courts, and English lawyers, was passing. More broadly, he thought the uniformity of the common law was now dependant on the ability of the House of Lords to make due allowance for the opinions of common law judges, in Australia and elsewhere, in reconsidering those decisions of the House of Lords that had not been followed in the High Court or elsewhere.[87] In his view, 'A new relationship of equality and mutual respect has emerged to replace the "colonial" attitude, clearly evident on both sides not so very long ago. This is a natural development, and one in which we should rejoice.'[88]

The first test of this new Eden would come with the Privy Council appeal in the *Uren* case. It was only a week between the granting of special leave by the Privy Council and the announcement of the Practice Statement, something St John thought was not coincidental. But the ultimate decision of the Privy Council, in July 1967, was not quite the victory for which the *corpus iuris* enthusiasts might have hoped. Rather than reject a decision of the House of Lords given less than five years previous, the Privy Council held that this was a case

[85] ibid.
[86] Times correspondent, quoted in E St John, 'Lords Break from Precedent' (1967) 16 ICLQ 811.
[87] ibid 815.
[88] ibid 816.

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where divergence between English and Australian law could be allowed:

> The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning, or had it been founded upon misconceptions, it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision, and where its policy in a particular country is fashioned so largely by judicial opinion, it became a question for the High Court to decide whether the decision in *Rookes v Barnard* compelled a change in what was a well-settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.[89]

With hindsight, the compromise encompassed in the decision seems strained. It was one thing to say that conditions in England and Australia were different and could justify different rules of law—Windeyer himself had argued for such a position—albeit why the Privy Council should be in a better positon than the High Court to make that judgement was unclear. But to retain a residual right to 'correct' the High Court if its reasoning was founded on 'misconceptions' or 'processes of faulty reasoning' does not square with the kind of deference at the heart of the decision. And what would happen if the Privy Council thought the legal rule consistent with the underlying policy choice but found the reasoning process faulty or misconceived?

Windeyer himself seemed to have been somewhat nonplussed by the decision of the Privy Council. Writing to Dean Wilbur Bowkett of Alberta Law School in response to an earlier letter, he noted that he had waited until the decision of the Privy Council before writing. Laconically, he said, 'Well we know that now', before recognising that the High Court had to 'henceforth accommodate, I hope wisely', our deep respect for our inheritance of the law with a greater independence in declaring for Australia the law we have inherited.[90] From a Canadian perspective Bowkett was clearly impressed by both the reasoning of *Skelton* and *Uren* as well as the willingness to depart from the House of Lords' authority.[91] And there was certainly evidence that the

[89] *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644.
[90] Letter Windeyer to Wilbur Bowkett, 15 December 1967 (SLNSW, WFP, MLMSS 9932, Box 5).
[91] Letter Bowkett to Windeyer, June 17 1967 (SLNSW, WFP, MLMSS 9932, Box 5).

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power of the reasoning that supported the High Court's choice to depart from the House of Lords' decisions in *Skelton* and *Uren* might ultimately herald the kind of multilateral *corpus iuris* to which Windeyer had referred in his 1966 lecture.[92] In May 1966 all three members of the English Court of Appeal in *Andrews v Freeborough* extoled the virtues of *Skelton v Collins* over *West v Shepherd* before a majority held they were bound by the latter case.[93] After the Privy Council decision in *Uren*, the English academic Robert Heuston wrote to Windeyer, noting that the judgment was 'masterly' in the way it dealt with a difficult problem and that the decision would be welcome to him (Windeyer). He thought the reference to the intrinsic merits of Lord Devlin's judgment in *Rookes v Barnard* were most skilful in the way they hinted at disapproval without actually stating it. While he thought the judgment created some difficulties for an English litigant wanting to know whether it was worthwhile going to the House of Lords to seek to have Devlin's judgment reversed, the implication was that the High Court had the better of the reasoning.[94] A review of the third edition of the Australian text Morison, Sharwood and Pannam's *Cases on Torts* in 1968 in the *Malaya Law Review*, lauding both the High Court's reasoning and willingness to depart from English authority with which it disagreed, gave some credence to Windeyer's idea that Australian courts might be the common law model in the post-empire world.[95] The zeitgeist was captured by Cornish in his earlier casenote on *Skelton*: 'It is interesting that at a time when English judges are taking more notice than ever before of decisions of courts in other common law jurisdictions, their Commonwealth brethren are showing new confidence in refusing to follow English judgments which they consider to be wrong in principle. Nowhere is this movement more marked at present than in Australia.'[96]

Yet as the third year law student at Sydney University, John Lehane, presciently noted, much would depend on whether the Privy Council's attitude as expressed in *Uren* would lead to a lasting change of

[92] For example, the hope expressed in Richard Kidner's review of the *Annual Survey of Commonwealth Law for 1967* ((1968) 33 Sask L Rev 309) that the conflict between *West v Shepherd* and *Skelton v Collins* would be solved on a Commonwealth basis.

[93] (1966) 110 Sol J 407.

[94] Letter RV Heuston to Windeyer, 23 August 1967 (SLNSW, WFP, MLMSS 9932, Box 5).

[95] M Hwang, 'Review of WL Morison, RL Sharwood & CL Pannam, *Cases on Torts* (3rd ed 1968)' (1969) 11 Malaya L Rev 373.

[96] W Cornish, 'Australian Views on Personal Injury Damages' (1966) 29 Mod L Rev 570.

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approach. As noted above, after *Parker*, the Privy Council had disapproved the reasoning, if not the result, in an occupier's liability case, *Commissioner for Railways (NSW) v Quinlan*, in the face of a well-developed line of High Court decisions seeking to bring the common law of occupier's liability within the scope of the general law of negligence.[97] Windeyer had been party to a number of those decisions. As Lehane observed, the approach of the Privy Council in *Quinlan* was a far cry from that taken in *Uren* and it remained to be seen whether the latter was an aberration, the beginning of a new era, or something in between.[98]

4. *The Status Quo Restored?*

The first opportunity to see whether the Privy Council decision in *Uren* heralded a new era also involved a tort case. *Evatt v Mutual Life and Citizens Assurance Co Ltd* was an action which required an interpretation of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, a groundbreaking decision of the House of Lords from 1963 introducing a liability in tort for negligent misstatement causing financial loss.[99] The *Evatt* case was decided on a series of demurrers that both sides entered against the other but the most significant related to the defendant's demurrer to the plaintiff's declaration, the decision on which turned on whether the defendant needed to be in the business of providing information or advice before a duty of care could be owed to the recipient. The issue was raised squarely in the case because the information had been sought from the defendants in their capacity as members of the same corporate group as the subject company about whom financial advice had been requested rather than as entities that provided information or advice as part of their business.

Upholding the decision of the New South Wales Court of Appeal, a majority in the High Court held that the *Hedley Byrne* duty could extend beyond those entities or individuals that provided information as part of their business to those who held special information on which the plaintiff had reasonably relied.[100] It is not necessary for present purposes to go into the detail of the five judgments (each judge

[97] *Commissioner for Railways (NSW) v Quinlan* [1964] AC 1054.
[98] Lehane (n 83) 117.
[99] [1964] AC 465.
[100] (1968) 122 CLR 556.

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delivered a judgment) but it is clear that they all recognised the importance of the case in terms of delimiting the *Hedley Byrne* duty. All were considered judgments that interrogated *Hedley Byrne* and the authorities on which it was founded.

Three members of the High Court had sat on both the *Skelton* and *Uren* cases, and one other, Kitto J, on *Skelton*. They did not feel it necessary to revisit the territory of the relationship between decisions of the House of Lords and the High Court and in any event the issue in *Evatt* was the scope of a House of Lords decision rather than its correctness. Nonetheless, there is nothing in those judgments to indicate any dissent from the comments of Barwick CJ on the wider question. Barwick had not sat on the earlier cases so perhaps he felt it necessary to explain his view:

> The matter so far as this Court is concerned is free of any binding authority. The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the Court's task is to express what is the law on this subject as appropriate to current times in Australia. This will not necessarily be identical with the common law of England... though it may always be preferable if substantial divergence between the two can be avoided.[101]

Windeyer did not sit on *Evatt* but there are obvious continuities between his comments in *Skelton* and Barwick's views in *Evatt*. Barwick returned to this theme in the Lionel Cohen Lecture he gave at the Hebrew University of Jerusalem in June 1969. 'Precedent in the Southern Hemisphere' is a detailed description of the historical relationship between decisions of the House of Lords, Privy Council, and High Court of Australia.[102] He quoted the above paragraph from his judgment in *Evatt* as an example of the views of at least one justice of the High Court on the question. And while he was anxious to avoid speculation as to future developments, he allowed himself at least three observations that impacted the answer to that question.

First, as for Windeyer, he saw the change in approach as the result of one hundred and fifty years of gradual development from colony to nation. While the process was marked by gradualism, 'a comparison of

[101] (1968) 122 CLR 556, 563.
[102] Barwick (n 21).

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the commencement with the end of the period I shall cover, leaves no doubt that a change of a fundamental kind has occurred.' The change was manifest not only in the degree of acceptance of English decisions or precedent 'but in an increasingly critical attitude to the work generally of the English Courts, particularly the Court of Appeal.'[103]

Second, he mused on whether the Privy Council decision in *Uren* had given 'what yet may prove the final quietus' to the endeavour of maintaining uniformity on matters of general principle. He was unimpressed by the Privy Council's attempt to paper-over this problem by identifying different social conditions between Australia and the United Kingdom: '. . .I cannot call to mind any purely Australian circumstance which would call for differential treatment as to the award of exemplary damages in defamation'.[104] In the same year, Rupert Cross, a long-standing friend of Windeyer, made the same comments on Windeyer's views in *Skelton* that the difference in social welfare legislation could justify the difference between *West v Shepherd* and *Skelton*: 'Might it not have been better simply to say that the reasoning of the minority in *West* v. *Shepherd* is to be preferred to that of the majority?'[105]

Thirdly, like Windeyer, Barwick did not see that diversity in application of the common law necessarily meant a lack of cohesion. The basic and abiding elements of interpreting the common law and statutory construction 'may produce a uniformity more meaningful than mere identity in particular solution'.[106] The leading Australian academic FKH Maher said something similar in an article published the same year. English courts were becoming more familiar with the law of the other common law countries and familiarity 'often breeds respect.'[107] The 'traffic in ideas' was now flowing in both directions. While local variation was inevitable and necessary, it was 'likely that developments (whether deviations in detail or diversification of rules) will come forward within the tradition and in accord with its canons of development—not contrary to that tradition or its techniques.'[108] And perhaps the most enthusiastic advocate was the youthful John Latham

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[103] ibid 10.
[104] ibid 39.
[105] R Cross, 'Recent Developments in the Practice of Precedent – The Triumph of Common Sense' (1969) 41 ALJ 3, 4.
[106] Barwick (n 21) 40.
[107] FKH Maher, 'The Common Law – Tears in the Fabric' (1969) 7 MULR 97, 106.
[108] ibid 108-9.

Professor of Law at Monash University, David Jackson, who looked forward to the creation of a judicial Commonwealth. As he put it:

> What is being urged in this article is not uniformity of development but development within the Commonwealth and particularly in England with judicial steps taken elsewhere in mind. It is suggested that the type of approach set out by Barwick in *M.L.C. Assurance Co. Ltd, v. Evatt* should be adopted by all Commonwealth courts. Like development should be as conscious as divergent. While different development is not lamentable, unknowing different develop is.[109]

Other events pulled in the same direction. At the political level, in January 1968 the Wilson government in the United Kingdom announced its intention to withdraw from Britain's overseas roles 'East of Suez', signalling the end of a tangible commitment to Australia's region.[110] More concretely, in Australia the Commonwealth Parliament legislated to restrict appeals to the Privy Council on matters of federal law.[111] In introducing the bill, the Attorney General stated both the Government's appreciation of the role the Judicial Committee of the Privy Council had played in the Australian judicial system since Federation and that the bill was an 'historic first step towards the establishment of the High Court as the final court of appeal for Australia.'[112] Not everyone was sanguine about this new development. High Court judge Douglas Menzies wrote in 1968 that the decisions of the House of Lords, Privy Council and High Court 'have had the unfortunate consequence of tearing the fabric of the common law even though it may be thought that the rent is but small'[113] but his sentiment for retaining appeals to the Privy Council, on which High Court judges after 1963 could sit as they were made Privy Councillors, was based on 'giving fresh life to organic links which are rooted in history, in tradition, in loyalty, and in the common endeavour. . .'[114] Whatever this somewhat metaphysical unity would encompass was uncertain but there was clearly confidence that the kind of judicial comity that underpinned *Uren* in the Privy Council would lie at the heart of it. As

[109] D Jackson, 'The Judicial Commonwealth' (1970) 28 CLJ 257, 271.

[110] PL Pham, *Ending 'East of Suez': The British Decision to Withdraw from Malaysia and Singapore 1964-1968* (Oxford University Press 2010) ch 7.

[111] Privy Council (Limitation of Appeals) Act 1968 (Cth).

[112] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, No. 13 1968, 28 March 1968, 568.

[113] D Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 ALJ 79, 85.

[114] ibid 87.

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a comment on the High Court decision in *Evatt* in the *Australian Law Journal* put it:

> The judgments examine *Hedley Byrne* not in order to find the correct principles which that case established but rather as a decision of assistance to the court in formulating the law for this country. In these circumstances, intervention by the Privy Council adverse to the majority seems unlikely.[115]

So it came as a shock when the Privy Council overturned the High Court decision in *Evatt* in a 3-2 decision.[116] Nowhere in the majority opinion was there a reference to whether the social conditions in Australia might justify the approach taken by the High Court. It was certainly arguable that the extent of liability that should be allowed from the transmission of specialised information and advice depended on the availability and market for such advice in the jurisdiction in question and that was a matter for the High Court. More generally, however, could the decision be said to be based on faulty reasons and misconceptions? In a powerful dissent, two of the three members of the Privy Council who had actually sat on *Hedley Byrne*, Lords Reid and Morris, supported the interpretations of their speeches by the majority of the High Court. Reviewing Barwick's Cohen Lecture when published as a pamphlet, Maher's enthusiasm for the grand project of the unity of common law method was now tempered: the decision of the Privy Council in the *Evatt* case 'shows the inevitable difference as to the applying of principles laid down and accepted by all the judges in the High Court, the Privy Council and the House of Lords'.[117] This too was a fudge: the question in *Evatt* was not the application of settled principles but the scope of a new principle. The editor of the *Australian Law Journal*, who had confidently forecast affirmation of the High Court decision, pithily noted: 'We were wrong.'[118] As Lehane had wondered, the Privy Council's deference in *Uren* was in fact an aberration, a short-term fix. Despite Barwick's optimistic words in Jerusalem, 'the High Court remained tied to the British legal system.'[119]

The confidence in the superiority of the High Court's reasoning in *Uren* over that of Lord Devlin in *Rookes* also proved misguided.

[115] 'Current Topics' (1968) 42 ALJ 281, 283.

[116] [1971] AC 793.

[117] FKH Maher, Review of Barwick, 'Precedent in the Southern Hemisphere' (1971) 8 MULR 344.

[118] 'Current Topics' (1971) 45 ALJ 1.

[119] D Marr, *Barwick* (2nd edn, Allen & Unwin 2005) 221.

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Complicated by Lord Denning's attempt to free the Court of Appeal from the precedential force of decisions of the House of Lords, when their Lordships reconsidered *Rookes* in *Broome v Cassell & Co Ltd* in 1972[120] there was no clamour for *Rookes* to be overturned in favour of the *Uren* line. While Viscount Dilhorne and Lord Wilberforce had difficulty in accepting the restrictions imposed by Lord Devlin's categories[121] and hence supported the pre-*Rookes* law which *Uren* had upheld, Lords Reid, Diplock, and to a lesser extent Lord Hailsham's, view was that exemplary damages were anomalous.[122] They supported *Rookes* as a compromise position and were reluctant to depart from a recent decision of their own. While some of their Lordships cited the judgments of Windeyer J and Taylor J in their speeches,[123] the unanimous decision of the High Court in *Uren* rejecting *Rookes* did not cause a change of heart among the majority of their Lordships. Lord Diplock saw the different policy judgment of the courts in Australia, New Zealand and some Canadian jurisdictions in rejecting the *Rookes* limitation as cogent grounds for reconsidering the decision but not for rejecting it if it was (as he thought) a step in the right direction.[124]

Viewed in the abstract, there was nothing in *Broome* that went against the idea of a *corpus iuris* of Commonwealth common law. For that ideal to have substance, however, it required English courts to meaningfully engage with that Commonwealth case law. In that respect, old habits died hard. Hence Lord Hailsham in *Broome* thought, with no doubt unintended irony, that Commonwealth courts might actually modify some of their criticisms of *Rookes* in light of the *Cassell* decision.[125] However well meant, it is hard not to see this as reflecting an imperial past in which English pronouncements of the common law deserved, if not automatic supremacy, than at least automatic priority. This was not the 'judicial Commonwealth' of which Jackson had enthused.

I have found no evidence of Windeyer's response to these precise developments. But from the late 1960s, through to his retirement from

[120] [1972] AC 1027.
[121] ibid 1108-9 (Viscount Dilhorne); 1119-20 (Lord Wilberforce).
[122] ibid 1086 (Lord Reid); 1127-28 (Lord Diplock); 1077, 1080 (Lord Hailsham).
[123] See, for example, ibid 1072, 1082 (Lord Hailsham), 1108 (Viscount Dilhorne).
[124] ibid 1127. By the time of *Broome* there was authority in both New Zealand (*Fogg v McKnight* [1968] NZLR 330) and Canada (*McElroy v Cowper-Smith and Woodman* [1967] SCR 425) that *Rookes* did not represent the law in those jurisdictions albeit that there was contrary authority in Canada (*Kirisitis v Morrell* (1965) WWR 123; *Sharkey v Robertson* (1969) 3 DLR (2d) 745.
[125] ibid 1083.

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the High Court in February 1972 and until he ceased travelling in the late 1970s, he corresponded with leading legal figures in England, both judges and academics. The list is a testament to both Windeyer's networking abilities but also the esteem in which he was held: it includes Lords Wilberforce, Simon, Cross, Pearson, Salmon, Hodson, Hailsham, Denning, Morton, Widgery, Diplock, Edmund-Davies and Kilbrandon, and from lower courts Lord Justices George Baker, Cumming-Bruce, Theisiger and Roskill. Academic correspondents included Rupert Cross (over many years), Treitel, Milsom, Holdsworth, Wade, Morris, JC Smith, Daniel O'Connell, Ellis-Lewis, Henry Holland and Norman Anderson.[126]

Three observations can be made from this correspondence. First, and most specifically, one of his closest correspondents, Lord Salmon, recognised that the treatment by English courts of the Australian cases of the 1960s had not been ideal. In a letter to Windeyer in 1973, Salmon wrote that he (Windeyer) knew Salmon's views on *DPP v Smith*, *Rookes*, *Quinlan* and *Uren*. All suggested the High Court had the better of the arguments. Particularly interesting are his comments on the tort cases:

> I wish that the PC in Uren and the HL in Broome v Cassell had been more robust in dealing with Rookes v Barnard. I think that there may well be a strong case for abolishing punitive damages altogether by statute but none for conjuring out of the air artificial distinctions upon the doctrine as Pat Devlin attempted to do in R v B. I hope the HL has another chance of looking at West v Shepherd.[127]

Salmon went on to say he was 'not happy' with the Privy Council's treatment of an occupiers' liability appeal involving child trespassers: 'a legal duty to act humanely seems to me a rather woolly concept we were however stuck with it by what the HL had so recently said in Herrington.'[128] Since the early 1950s, led by Dixon CJ the High Court had begun to avoid restrictions on trespassers recovering against occupiers by framing an alternative analysis under the general law of negligence.[129] Windeyer had been part of this

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[126] SLNSW, WFP, MLMSS 9932, Boxes 5, 8.

[127] Letter Salmon to Windeyer, 1 December 1973 (SLNSW, WFP, MLMSS 9932, Box 8).

[128] ibid.

[129] Finn, 'Unity, Then Divergence' (n 6) 46; M Lunney, 'Dixon's Tort Judgments: Master Craftsman or Competent Technician?' (n 17) 203-205.

process.[130] The development had been rejected by the Privy Council in *Quinlan's* case, mentioned above.[131] In the first occupiers' liability case on the issue to come before the High Court after *Quinlan*, *Munnings v Hydro-Electric Commission*, Windeyer's frustration with the rejection of the Australian approach was evident but on the facts he found a way of distinguishing *Quinlan*.[132] This remained necessary as the Privy Council still bound the High Court of Australia because that was part of 'accepting our heritage of the common law of England.'[133] When the High Court next had to deal with the question, in *Cooper v Southern Portland Cement Ltd*,[134] *British Railways Board v Herrington*[135] had been decided by the House of Lords altering the law for England and Wales on an occupier's duty to trespassers, and the High Court was left trying to deal with *Quinlan*—which as a Privy Council decision was binding—and *Herrington* as well as its own decisions. Windeyer had left the court by the time of the *Cooper* decisions[136] but there is little doubt Salmon felt as apologetic on the Privy Council's attempt to reconcile these contradictions as he was in respect of the other decisions. The recognition by the Privy Council in *Cooper* that Australian courts had adopted 'some intricate and possibly confusing reasoning' to deal with the restrictions imposed by *Addie v Dumbreck*[137] and *Quinlan* simply illustrated the inadequacies of existing arrangements.[138] The legitimacy of the precedential force of the old system was coming under immense strain.

Paradoxically, a second theme of the correspondence, particularly with judges, is the reference to the quality of Australian judgments,

[130] See particularly his judgment in *Rich v Commissioner for Railways (NSW)* (1959) 101 CLR 135, 154-161, a case in which Dixon did not sit. Windeyer agreed in principle with Dixon CJ in *Cardy v Commissioner of Railways (NSW)* (1960) 104 CLR 274, the case that definitively established the new approach to an occupier's duty to trespassers.

[131] Although in March 1966, the Privy Council distinguished *Quinlan* in an appeal from the Supreme Court of New South Wales in a case involving a lawful entrant, endorsing the possibility of dual bases for a duty owed by an occupier to a lawful visitor: *Commissioner for Railways (NSW) v McDermott* [1967] 1 AC 169.

[132] (1971) 125 CLR 1, 25-28.

[133] ibid 26.

[134] (1972) 128 CLR 427.

[135] [1972] AC 877.

[136] The case was appealed to the Privy Council ([1974] AC 623) where both *Herrington* and *Cardy v Commissioner for Railways* were applied whilst distinguishing *Quinlan*.

[137] *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358, a decision of the House of Lords limiting the duty owed by an occupier to a trespasser and the foundation of *Quinlan*.

[138] [1974] AC 623, 645.

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particularly those of Windeyer. Noting the possibility that Australian Privy Councillors might not be able to sit judicially, Wilberforce opined 'it would be a real loss for us not to have our annual injection of strength.'[139] Commenting on Windeyer's presence on the Privy Council over the summer of 1972, Oxford Professor John Morris hoped 'you made your colleagues sit up.'[140] Cumming-Bruce J told Windeyer 'I have long held that Australian judges are the best bunch in the Anglo-Saxon system, & if in doubt I hunt for an Australian authority'.[141] Slightly more wistfully, when they were both old men Denning wrote to Windeyer that his (Windeyer's) judgments were landmarks in the High Court, the first he turned to when a High Court case was cited. Denning thought the High Court had changed out of all recognition 'but it will never come up to the high standard and reputation it had in your time.'[142] No doubt this was all gratifying but the private praise did not quite match the public persona. It was one thing to praise the quality of the High Court and another to put that into practice in a system that retained a degree of imperial hierarchy.

Finally, Windeyer's English judicial correspondents of the 1970s were uniformly negative about the future of England generally and the move into Europe in particular. Lord Cross, for example, wrote to Windeyer in June 1974 that 'we are in a MESS! I have lived through two World Wars and I do not remember ever feeling so gloomy about the future of this country as I am today.'[143] Earlier that year Wilberforce described the political situation in the United Kingdom—a Labour government determined to put over the most socialist programme we have ever seen—as making it hard to avoid bitterness 'however we shall try.'[144] But the greatest anger was reserved for the changes being made as a result of the accession of the United Kingdom to the European Community. Salmon told Windeyer:

> I can assure you that everyone over here is angry, hurt, disgruntled by the ridiculous and insensitive way in which you our brothers in Australia

[139] Letter, Wilberforce to Windeyer, 1 January 1973 (SLNSW, WFP, MLMSS 9932, Box 5).
[140] Letter Morris to Windeyer, May 7 1970 (SLNSW, WFP, MLMSS 9932, Box 5).
[141] Letter Cumming-Bruce to Windeyer, 25 March 1975 (SLNSW, WFP, MLMSS 9932, Box 5).
[142] Letter Denning to Windeyer, 15 September 1982 (SLNSW, WFP, MLMSS 9932, Box 5).
[143] Letter Cross to Windeyer, 9 June 1974 (SLNSW, WFP, MLMSS 9932, Box 5).
[144] Letter Wilberforce to Windeyer, March 19 1974 (SLNSW, WFP, MLMSS 9932, Box 5).

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> New Zealand and Canada have been treated by this government. I cannot understand how such treatment can possibly be justified on any sound basis of policy, reason or law. I hope and believe the government may have the good grace to recant.[145]

Wilberforce was equally caustic about the 'alienisation' policy (proposals to require entry visas for members of the old Dominions, including Australia). He told Windeyer: 'We feel bitterly about it and there have been strong things said in both House of Parliament. Nobody is in favour of this policy which has emerged from some dark corner of Whitehall'. After consoling himself as much as Windeyer that in practice entry rights would not be much affected, he concluded defiantly: 'Whatever the Treaty of Rome may say, Australians and N-Z^ers^ so long as they keep coming will be us and not visitors.'[146]

What is to be made of all this? On a personal level the ties between Windeyer and his English colleagues were close and genuine but the wider context could not be ignored. Apart from the challenges of the United Kingdom's accession to the European Economic Community, which played a significant role in forcing a rethink of both Australia's self-conception of its identity as well as its place in the world, the emergence of Australian legal independence had not been taken on board by the Privy Council or House of Lords by the creation of a new judicial Commonwealth. It was one thing for the correspondents to privately tell Windeyer that Australian judicial views should be given more weight whilst assuring him of his and his countrymen and women's continuing connectedness despite the political changes that were plainly suggesting the opposite. It was another thing to have given this some public content. It would have been unrealistic to think that every decision of higher English courts would have preferred Commonwealth authority to its own but at least some 'wins' for the latter were needed to give the idea of a new legal order some credence. Lord Hailsham recognised the writing on the wall when he wrote to Windeyer in April 1972: 'I hope that not only you but all in Australia will realise the sincerity and warmth of your welcome here and the importance of fostering the personal, and, where possible, the constitutional links between us'.[147] Personal links could remain grounded in

[145] Letter Salmon to Windeyer, 19 December 1972 (SLNSW, WFP, MLMSS 9932, Box 5).

[146] Letter Wilberforce to Windeyer, January 1 1973 (SLNSW, WFP, MLMSS 9932, Box 5).

[147] Letter Hailsham to Windeyer, 26 April 1972 (SLNSW, WFP, MLMSS 9932, Box 5).

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British race patriotism but the challenge to more formal links was much greater, especially in an era of self-confessed British decline.

One way to reinforce links, espoused on one level by Windeyer in his 1966 lecture, was to focus continuity on more abstract concepts rather than on more grounded legal principles. At the inaugural dinner of the Australia-Britain Society held at Sydney's Wentworth Hotel in August 1971, the guest speaker was Lord Denning. It is not clear whether everyone on the invitation list attended but it included leading figures in politics, business and the military.[148] Many judges were also invited, including Windeyer. In what was a rallying call to keep the bonds that joined Australia and the United Kingdom in light of the new political realities—particularly Britain's move towards Europe—Denning did discuss the historic legal connections. No doubt in part because of his audience, but also because it spoke to the new kind of relationship emerging, Denning's legal focus was on shared legal heritage. Along with the common fight against oppressors in two world wars, the principle of the rule of law took its place alongside language as the great cultural imports Australia took when it was populated by the British race. Only once did Denning stray from Olympian heights to urge caution against the adoption of a bill of rights: 'we managed quite well, and have managed quite well' through judicial enunciation and enforcement of rights.[149] As Denning acknowledged, Windeyer was also opposed to a bill of rights, believing that democracy operating through responsible government was better placed to protect freedom than any written words. Although slightly less abstract than the 'rule of law', the place for a bill of rights was a long way from a *corpus iuris* of more grounded common law. Even by 1971, the relevant 'chains that bind', at least in private law, were becoming metaphysical, appeasing rather than constraining.

Windeyer himself continued to visit regularly the United Kingdom in the 1970s, serving a particularly successful stint on the Judicial Committee of the Privy Council in the English summer of the 1972. He was called as an honourary bencher of Middle Temple in April 1972 and made a practice of welcoming new Treasurers of the Inn for a number of years after his call. Poignantly, he commissioned and donated a silver kangaroo to Middle Temple's Silver Collection in 1976 where it remains to this day.[150] There is thus absolutely no doubt

[148] SLNSW, WFP, MLMSS 9932, Box 9.
[149] ibid.
[150] See Appendix 1. I am grateful to Barnaby Bryan, archivist at Middle Temple, for providing me with the dates. The author acknowledges the kind permission of Middle Temple to reproduce its catalogue entry for this piece.

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that Windeyer treasured his legal heritage in a common law that crossed jurisdictions.

Windeyer returned to these themes in his last major lecture in the United Kingdom, the Commonwealth Lecture delivered at St John's College Cambridge in November 1977. The lecture, 'Australia in the Commonwealth', is an overview of both Australia's imperial history and its forced adaptation from a Dominion of the Empire to member of the Commonwealth. Windeyer was 77 years old when he gave the lecture and elements of it reflect a wistful restatement of past truths as much as a realistic assessment of Australia's new place in the world. To the suggestion that Australia was or should become an Asian country, Windeyer's response was that in the customs and habits of its people 'it is derivatively and essentially a British land with the history of England as the mainstream of their history and an inheritance of the law of England, Parliamentary governance, Shakespeare, cricket and rugby football'.[151] Suggestions of Australia becoming a republic were also given short shrift:

> Australians today cherish sentiments that are a heritage from the days of Empire. Their allegiance to the Queen is because she is Queen of Great Britain and Queen of Australia, not because she is head of the Commonwealth, which means little or nothing in Australia… Apart from formal legal links many institutions and voluntary societies in Australia preserve and foster ties with Britain – among others the Royal Commonwealth Society, the Australia-Britain Society, the Victoria League, and a host of charitable and professional bodies that are offshoots of, or allied with, counterparts in the United Kingdom.[152]

Legal ties remained central to Windeyer's vision of the closeness of the British-Australian relationship in the post-Empire world. The idea of service to his people under the Union Jack—with which he finished his lecture—was a core belief of the independent Australian Britons of which he formed part. The idea had always had its contradictions,

[151] V Windeyer, *Australia and the Commonwealth* (Cambridge University Press 1978) 24-5. Even the reference to cricket was slightly old-fashioned: G Haigh, *The Summer Game: Australian Test Cricket 1949-1971* (Text Publishing 1997) 262-266. See also V Windeyer, 'Address at Dinner Arranged by the Most Excellent Order of the British Empire Association (New South Wales)' in Debelle (n 39) 179. Windeyer also saw links between British Christianity and the Australia's inherited common law: C Webster, 'Sir Victor Windeyer' in G Lindsay & W Hudson, *Australian Jurists + Christianity* (Federation Press 2021) 170-171.

[152] Windeyer, *Australia and the Commonwealth* (n 151) 31.

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pointed out by one of its greatest advocates WK Hancock in 1937,[153] but shorn of the unifying influence of Empire, it increasingly resembled a rhetorical tool clung to by people struggling to comprehend what might replace it in a world where the certainties of the past had been replaced by the contingencies of the future. Windeyer recognised the factors that were changing Australian society by 1977—in particular changes to immigration—but could not bring himself to admit the British race patriotism that underlay his sentiments were no longer justified in modern Australia. By 1977, the formal legal links were fast fading: the Whitlam government had sought to end appeals to the Privy Council but was thwarted by recalcitrant state governments playing politics as much as demonstrating a commitment to the old ideal.[154] Whitlam went as far as he could, barring appeals from the High Court to the Privy Council in 1975.[155] Edward St. John, who less than ten years earlier had been interested in how *English* courts would react to changes in precedential practices, recognised that the 1975 Act made the focus for Australians different: the High Court now had to be 'the great Australian court, developing Australian law for the Australian people'.[156] Less than six months after Windeyer's lecture, all five members of the High Court held, in *Viro v R*, that this legislation required that the High Court no longer be bound by decisions of the Privy Council whether before or after the commencement of the legislation.[157] By 1980, Barwick could assert that where Australian courts diverged from British decisions 'it has not been because of a need to accommodate the common law to any local conditions: but rather because the local court has preferred its own view of what the common law is.'[158] The unsatisfactory position which remained for state courts, possibly having the decisions of two courts, the High Court and the Privy Council, binding on them inevitably

[153] WK Hancock, *Survey of British Commonwealth Affairs Vol 1: Problems of Nationality 1918-1936* (Oxford University Press 1937) 44. Late in both their lives Hancock wrote to Windeyer: 'You and I share the same interests and loyalties': Letter Hancock to Windeyer (SLNSW, WFP, MLMSS 9932, Box 6).
[154] S Ward and J Curran, *The Unknown Australia: Australia After Empire* (Melbourne University Press 2010) 137-141.
[155] Privy Council (Appeals from the High Court Act) 1975 (Cth).
[156] E St. John, 'The High Court and the Privy Council' (1976) 50 ALJ 389, 398.
[157] (1978) 141 CLR 88.
[158] G Barwick, 'Law and the Courts' in AF Madden & WH Morris-Jones, *Australia and Britain: Studies in a Changing Relationship* (Sydney University Press 1980) 161.

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meant that pressure would come to end the final judicial connections,[159] a move that was accomplished by the Australia Acts of 1986.[160] The common law would remain a shared cultural heritage between Britain and Australia but the sharing was done by partners tied by history rather than British race patriotism.

5. *Conclusion*

British race patriotism is fundamental to understanding the historical relationship of Australian lawyers to their common law. Its influence on notions of Australian identity waxed and waned throughout the twentieth century with concomitant effects for how the common law was viewed. Crude accounts which divide the century into periods of subservience and liberation miss the complex nuances that surrounded changes to the ubiquity of British race patriotism over time and forced all Australians, including lawyers, to question the previous certainties associated with living under the Union Jack.

The most complex of the nuances were associated with the political changes in Britain in the 1960s and the resultant change in the nature of Australia's legal relationship with Britain. For lawyers like Sir Victor Windeyer, British race patriotism was at the heart of the legal traditions and rules inherited by Australians. It was not something that could be jettisoned without losing the very core of the legal institutions he cherished. The challenge was to marry the change necessitated by the political realities with the traditions of the common law that were associated with British race patriotism. A Commonwealth *corpus iuris* was his solution to the problem. While Windeyer did not think that required legal rules to be uniform amongst countries, it did require an attempt to engage with the merits of decisions free from the power imbalances that had historically favoured English courts when dealing with Australian cases. But the imperial legacy was not easily disowned. While Windeyer's correspondence with English judicial friends indicate the personal connections forged through British race patriotism remained strong, the fact remained that Australian cases were largely ignored in England until the 1960s, and any enthusiasm that the Privy

[159] A Blackshield, 'The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"' (1978) Adelaide Law Review Research Paper No. 1, 64-78, 110-141.

[160] For detail on the negotiation and passage of the legislation see A Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press 2010) ch 3.

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Council's deference in the *Uren* appeal might herald genuine change was soon diminished by the Privy Council decision in *Evatt* and the House of Lords' decision in *Broome*. It is no surprise that the final release from the strictures of imperial precedent ushered in by the Australia Acts brought forward a genuine sense that Australian law was now truly free.

Windeyer's idea of a *corpus iuris* as a de facto substitute has in one sense largely emerged. The supreme judicial bodies of Commonwealth countries, especially of the old Dominions, continue to this day to consult decisions of similarly situated courts in other countries in reaching decisions where new judicial steps are taken. Windeyer would have approved. The point here is not that the independent Australian Britons of Windeyer's generation were completely off the mark in the new model they envisaged for post-Empire legal interaction. Rather, it is that the normative underpinnings of the process subtlety altered from one more directly influenced by membership of the British race to inheriting more abstract traditions that were valuable in their own right. The hopes of the independent Australian Britons that greater judicial independence could be married with traditional British race patriotism were ultimately, if inevitably, disappointed.

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APPENDIX 1

265 - SILVER MODEL OF A KANGAROO, N.D.

LOCATION: 7/B/3

MAKER/SPONSOR: Australia

MAKER/SPONSOR'S MARK: WWH

DIMENSIONS: 17.6cm wide, 18cm high

WEIGHT: 1708g (55 oz.)

DESCRIPTION

A modern Australian cast silver Model of a Kangaroo.

PROVENANCE

Donated by the Right Honourable Sir Victor Windeyer, KBE, CB, DSO, ED, 1976.

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